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No. 435

In the Supreme Court of the United States

OCTOBER TERM, 1950

BOWMAN DAIRY COMPANY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA AND WILLIS L. HOTCHKISS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS

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OPINION BELOW

The opinion of the Court of Appeals for the Seventh Circuit (R. 128) is reported at 185 F. 2d 159.

JURISDICTION

The judgment of the court of appeals was entered on November 7, 1950 (R. 140). The petition for writ of certiorari was filed on December 6, 1950, and granted on January 15, 1951. The jurisdiction of this Court is invoked under 28 U. S. C. 1254.

QUESTION PRESENTED

Whether Rule 17 (c) of the Federal Rules of Criminal Procedure authorizes a district court to

order pre-trial production of all documents obtained by Government counsel, in any manner other than by seizure or process, in the course of the grand jury investigation and of preparation for trial if such documents were presented to the grand jury, or are to be offered as evidence on the trial or are relevant to the allegations or charges contained in said indictment, "whether or not they might constitute evidence with respect to the guilt or innocence of any of the defendants."

FEDERAL RULES INVOLVED

Federal Rules of Criminal Procedure:

> RULE 16. DISCOVERY AND INSPECTION.—Upon motion of a defendant at any time after the filing of the indictment or information, the court may order the attorney for the government to permit the defendant to inspect and copy or photograph designated books, papers, documents or tangible objects, obtained from or belonging to the defendant or obtained from others by seizure or by process, upon a showing that the items sought may be material to the preparation of his defense and that the request is reasonable. The order shall specify the time, place and manner of making the inspection and of taking the copies or photographs and may prescribe such terms and conditions as are just.
>
> RULE 17. SUBPOENA.—(a) For Attendance of Witnesses; Form; Issuance.

A subpoena shall be issued by the clerk under the seal of the court. It shall state the name of the court and the title, if any, of the proceeding, and shall command each person to whom it is directed to attend and give testimony at the time and place specified therein. The clerk shall issue a subpoena, signed and sealed but otherwise in blank to a party requesting it, who shall fill in the blanks before it is served. A subpoena shall be issued by a commissioner in a proceeding before him, but it need not be under the seal of the court.

* * * * * *

(c) For Production of Documentary Evidence and of Objects.

A subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein. The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive. The court may direct that books, papers, documents or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents or objects or portions thereof to be inspected by the parties and their attorneys.

STATEMENT

This proceeding arose in a criminal case based upon an indictment charging a violation of the

Sherman Act. Petitioners are the defendants named in the indictment. They seek reinstatement of an order, reversed by the court below, which committed respondent Hotchkiss for contempt of court. The contempt order resulted from the refusal of respondent Hotchkiss, the Chief of the Midwest Office of the Antitrust Division of the Department of Justice, to comply with an order of the district court requiring him to make available to the petitioners for pretrial inspection all documents and other materials of the character described in a subpoena *duces tecum* issued under the purported authority of Rule 17 (c) of the Federal Rules of Criminal Procedure.

The indictment in this case, returned on July 30, 1948 (R. 2), charges eight corporations, all engaged in the milk business in the greater Chicago area, and nine officers of these corporations, with conspiring to allocate among themselves wholesale fluid milk customers in the Chicago area and sales of fluid milk to certain public institutions therein, in violation of Section 1 of the Sherman Act (R. 3–9). Motions by the petitioners to dismiss the indictment were denied by the district court on April 13, 1949 (R. 117).

On June 13, 1949, the trial date not having been set (R. 117), petitioners made two pretrial motions aimed at securing access to documentary material in the Government's possession relating to this case. One of these motions, made under Rule 16 of the Criminal Rules, requested an order

directing the Government to produce for petitioners' inspection the documents which the Government had obtained from the petitioners or other persons by seizure or process (R. 28–46). The other, made under Rule 17 (c), was for an order requiring the Government to produce for petitioners' inspection documents obtained by the Government by means other than by seizure or process (R. 10–27).

The parties having agreed on the form of an order for inspection of documents pursuant to Rule 16, such an order was entered by the court on November 7, 1949 (R. 52, 64). The order required the Government to permit defendants to inspect and copy the documents obtained by the Government by subpoenas *duces tecum* issued in connection with the grand jury investigation which had resulted in the petitioners' indictment (R. 64). Attached to the order was an exhibit listing 56 such subpoenas (R. 65–69).

The motion under Rule 17 (c) sought production of materials covered by a subpoena *duces tecum* which petitioners had served upon respondent Hotchkiss and Otto Kerner, Jr., the United States Attorney for the Northern District of Illinois. The subpoena directed production of (R. 71):

> all documents, books, papers and objects (except memoranda prepared by Government counsel, and documents or paper

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solicited by or volunteered to Government counsel which consist of narrative statements of persons or memoranda of interviews), obtained by Government counsel, in any manner other than by seizure or process, (a) in the course of the investigation by Grand Jury No. 8949 which resulted in the return of the indictment herein, and (b) in the course of the Government's preparation for the trial of this cause, if such books, papers, documents and objects, (a) have been presented to the Grand Jury; or (b) are to be offered as evidence on the trial of the defendants, or any of them, under said indictment; or (c) are relevant to the allegations or charges contained in said indictment, whether or not they might constitute evidence with respect to the guilt or innocence of any of the defendants.

On November 7, 1949, a hearing was held before Judge Barnes on petitioners' motion under Rule 17 (c). At this hearing, counsel for the Government undertook to state the Government's legal objections to the subpoena[1] and at the same time reiterated a previous offer to make available to the petitioners certain categories of the evidentiary materials in the Government's possession (R. 56). The court took the position that the subpoena was proper; and it entered an order requiring production for the petitioners' inspec-

[1] The Government did not complete the presentation of its objections because discussion of them was terminated by the trial court (R. 55).

tion of the "books, papers, and documents designated in the subpoena" (R. 69).

Thereafter, on November 28, 1949, the Government moved to quash the subpoena and to set aside the order directing compliance with it (R. 72, 73). The Government contended, *inter alia*, that the right of defendants in criminal proceedings to obtain access to materials in the custody of attorneys for the Government is limited to the rights granted by Rule 16 of the Criminal Rules, and that the court had acted outside its jurisdiction in ordering production of the subpoenaed material.[2]

On January 4, 1950, the court denied the Government's motion to quash (R. 83–84). Respondent Hotchkiss thereupon submitted to the court a written statement, in the form of an affidavit, which averred that all of the documents and other materials which the court had ordered produced were in his custody (R. 84–85). The statement, after summarizing the reasons for the Government's contention that the subpoena and order were not authorized by Rule 17 (c), stated that respondent Hotchkiss, acting on the advice and instructions of the Attorney General and the Assistant Attorney General in charge of the Antitrust Division, respectfully declined to com-

[2] The Government also contended that the attorney for the Government was not subject to subpoena under Rule 17 (c). That contention was abandoned in the court of appeals and is not made here.

ply with the court's order of November 7, 1949 (R. 86–87).

On January 5, 1950, the court entered an order finding respondent Hotchkiss guilty of contempt of the court in refusing to produce the documents designated in the subpoena and in refusing to comply with the court's order of November 7, 1949 (R. 99). The court committed respondent Hotchkiss to the custody of the Attorney General to be held until he should comply with the provisions of the subpoena *duces tecum* and should obey the court's order of November 7, 1949, or until he should be discharged from custody by due process of law (*ibid.*).[3]

The court below reversed the contempt order. In an opinion by Judge Duffy, the court held that the Government's motion to quash the subpoena and to set aside the order of compliance should have been granted (R. 128, 134). The court reviewed the history of the successive drafts of the discovery rule, and stated (R. 132):

> Considering the history of Rule 16 which shows the evolution from the broad terms of its first draft to its final restrictive and limited terms, it is difficult to believe that the framers of the rule intended to authorize discovery and inspection of broad scope under Rule 17 (c) pertaining to subpoena

[3] On the same day the court below admitted respondent Hotchkiss to bail on his own recognizance (R. 102).

> which was expressly prohibited by Rule 16 which is the rule intended to cover discovery and inspection. It does not make sense to have created in one rule a privilege of discovery limited to documents and papers belonging to the defendant or taken from others by seizure or process and at the same time to create in Rule 17 (c) an almost unlimited right of discovery by use of the subpoena provisions.

With respect to the proper function of Rule 17 (c), the court said (R. 134):

> It is our view that Rule 17 (c) provides for the traditional type of trial subpoena, although as a matter of convenience it may be made returnable before the actual date of trial. However, it may not be converted into an unrestricted pre-trial discovery device.

Chief Judge Major filed a separate concurring opinion in which he expressed his agreement "with the result reached by Judge Duffy and with his reasoning" (R. 134) but in addition expressed the view that Rule 17 (c) is applicable only to witnesses other than parties or their attorneys, so that respondent Hotchkiss, as attorney for the Government, could not be subpoenaed in this case (R. 134-138).

Judge Lindley, dissenting, was of the view that the effect of the court's decision was to render Rule 17 (c) a nullity (R. 139).

SUMMARY OF ARGUMENT

I

The subpoena *duces tecum* and order to produce exceed the limits of pretrial discovery established by Rule 16 of the Rules of Criminal Procedure. Rule 16 permits discovery of materials taken from or belonging to the defendant or obtained from others by seizure or process. The instant subpoena requires production of materials irrespective of the sources from which they were obtained. The history of Rule 16 shows that the limitations there contained were not inadvertently introduced. Broad pretrial discovery in criminal cases was not permitted in pre-rule practice. Early drafts of the discovery rule were patterned after the broad discovery permitted under the Civil Rules but such an innovation was discarded in favor of the restricted discovery privilege embodied in Rule 16.

The Criminal Rules should be interpreted as an integrated and harmonious whole. If the present subpoena were permitted under Rule 17 (c), it would render the carefully drawn limitations of Rule 16 nugatory, and render Rule 16 itself superfluous.

II

The language and history of Rule 17 (c) show that it is not intended as a pretrial discovery device, and may not properly be utilized to expand the scope of permissible discovery under

Rule 16. Rule 17 (c) contemplates a traditional trial subpoena *duces tecum* with the single novel element that the materials subpoenaed may be ordered produced before trial. But this pretrial production provision does not convert the subpoena from a mechanism for obtaining production of specific, described evidence for use at the trial to a device for conducting a general exploration into the opposing party's files. The present subpoena is deliberately cast in the latter form. It seeks production of the Government's documentary materials whether or not evidentiary in character. The limits on pretrial discovery established by Rule 16 cannot be thus circumvented. Rule 17 (c) may not be used by either defendants or the Government in the manner here attempted.

ARGUMENT

INTRODUCTION

This case involves the character and limitations of pre-trial discovery under the Federal Rules of Criminal Procedure. It is not, as petitioners imply (Petitioners' Br. 39–41), a privilege case in disguise. There is no question of governmental privilege at issue in these proceedings, nor is there any contention that Rule 17 (c), the rule under the asserted authority of which the present subpoena was issued, is to be interpreted differently as applied to the Government than as to defendants. The Government's contention here is that the subpoena and order to produce which were directed to respondent Hotchkiss were

not authorized by the Criminal Rules. The subpoena and order require production of materials as to which it is conceded that discovery has not been authorized by Rule 16, the discovery and inspection rule. We contend that authority for the subpoena and order cannot properly be based upon Rule 17 (c), which provides for subpoenas *duces tecum*. Our contention would apply equally to attempted use by the Government of Rule 17 (c) as a pre-trial discovery device.

Resolution of the issues here presented requires consideration of Rules 16 and 17 (c) and of their relationship with each other. The Federal Rules of Criminal Procedure, which were designed and promulgated as an integrated system for the regulation of criminal cases in federal courts, should not be treated as a collection of unrelated statutes. The rule specifically dealing with discovery cannot properly be ignored in considering the validity of a construction of the subpoena rule which would result in broad pre-trial discovery (cf. Petitioners' Br. 13).[4]

The decision of the court below interprets Rules 16 and 17 (c) in a manner consistent with

[4] In the construction of statutes, it is well settled that particular provisions must be looked at, not in isolation, but in the setting of the related provisions which accompany them. All sections of a statute must be read "as an integrated whole." *Clark* v. *Uebersee Finanz-Korporation, A.G.*, 332 U. S. 480, 488; see *Duparquet Co.* v. *Evans*, 297 U. S. 216, 218. Compare *Hickman* v. *Taylor*, 329 U. S. 495, 505: "The deposition-discovery rules [of the Rules of Civil Procedure] create integrated procedural devices."

the purposes of each, but at the same time avoids placing them at cross purposes. It recognizes that the limits of pretrial discovery are established by Rule 16, which authorizes discovery as to documents and other materials (1) taken from or belonging to the defendant, or (2) obtained from others by seizure or process. And it holds that the area of discovery may not be enlarged through use of the subpoena *duces tecum* authorized by Rule 17 (c). The latter rule permits the court to require pretrial production for inspection purposes of subpoenaed documentary or other physical evidence. The court below correctly construed this provision as one for production of *evidentiary* material subpoenaed for actual use at the trial, rather than as a device for a virtually unrestricted pretrial exploration into the documentary materials in the possession of the Government, whether or not those materials are evidentiary in character, and however they may have been obtained.

In contrast to the harmonious interpretation placed upon the two rules by the court of appeals, petitioners would seize upon the general language of Rule 17 (c) to render meaningless the carefully drawn limitations found in the specific language of Rule 16. Petitioners have drawn an ingenious distinction in the purposes of the two rules as they interpret them, but they cannot point to any instance in which the limita-

tions of Rule 16 would be applicable and effective if Rule 17 (c) is given the construction they seek. More than this, they cannot point to any function that would be left to be performed by Rule 16 if Rule 17 (c) is to be an open sesame to the opposing party's files. As the court below remarked (R. 132): "It does not make sense to have created in one rule a privilege of discovery limited to documents and papers belonging to the defendant or taken from others by seizure or process and at the same time to create in Rule 17 (c) an almost unlimited right of discovery by use of the subpoena provisions."[5]

To sustain a construction of Rule 17 (c) which renders explicit limitations in the preceding rule nugatory, petitioners must demonstrate that the language of Rule 17 (c) or the expressed intention of its framers inescapably demands such a result. We propose to show that, on the contrary, petitioners' interpretation of Rule 17 (c) is not required by the language of that subdivision, and was not contemplated by the Advisory Committee which drafted the rules.

Petitioners argue that the Government has waived any objection to the challenged subpoena except that "founded on the restrictions of Rule

[5] And see the even more vigorous comment of Chief Judge Major, concurring (R. 137): "It borders on the absurd to argue for a construction of Rule 17 (c) which would confer on a defendant an unlimited right of production by the government when such right has been definitely limited in Rule 16 by exact and specific language."

16" (Petitioners' Br. 11, 36). Hence it is said that any reference to a "fishing expedition" is out of place (*ibid.*). This contention reveals a misunderstanding as to the fundamental nature of the Government's position and of the holding below. The court of appeals held, and we have contended throughout this proceeding, that Rule 16 defines the permissible scope of pre-trial discovery, and that this subpoena seeks pretrial discovery beyond the limits established by that rule. The characteristic which distinguishes the present subpoena from permissible trial process, and places it in the category of attempted discovery is the same characteristic which makes it partake of a fishing expedition. The subpoena seeks exploration, not particular described evidence.

I

THE SUBPOENA AND ORDER FOR PRODUCTION PROVIDE FOR PRETRIAL DISCOVERY OF A CHARACTER NOT AUTHORIZED BY RULE 16, THE DISCOVERY AND INSPECTION PROVISION OF THE CRIMINAL RULES

By the subpoena here in issue petitioners have sought to inspect substantially all papers and objects which the Government obtained in its investigation and preparation for trial, "whether or not they might constitute evidence with respect to the guilt or innocence of any of the defendants."[6] Their avowed purpose is not to examine

[6] The subpoena excepts "memoranda prepared by Government counsel, and documents or paper solicited by or volunteered to Government counsel which consist of narrative statements of persons or memoranda of interviews" (R. 71).

specified documents and objects for authenticity or the like. It is, as their brief makes clear, to be able "to know more exactly the issues in the cause" and to be aided "in unearthing other documents and records" (Petitioners' Br. 23). No matter how petitioners may seek to characterize it, what they have sought is pre-trial discovery of the broadest conceivable scope.

Accordingly, in considering whether petitioners can succeed in their attempt, we look first at that one of the Criminal Rules which in terms relates to pretrial discovery. Rule 16, entitled "Discovery and Inspection," provides as follows:

> Upon motion of a defendant at any time after the filing of the indictment or information, the court may order the attorney for the government to permit the defendant to inspect and copy or photograph designated books, papers, documents or tangible objects, *obtained from or belonging to the defendant or obtained from others by seizure or by process,* upon a showing that the items sought may be material to the preparation of his defense and that the request is reasonable. The order shall specify the time, place and manner of making the inspection and of taking the copies or photographs and may prescribe such terms and conditions as are just. [Emphasis supplied.]

Under this provision the discovery which is authorized is limited as to the party who may invoke it, the person against whom it may be

invoked, and the materiality of the matters sought to be discovered. But the significant limitation for present purposes is the restriction upon the character of documents and other objects as to which the privilege of discovery may be granted. The portion of the rule italicized above restricts discovery to materials taken from or belonging to the defendant, or materials obtained from others by seizure or process. Thus discovery is available only as to materials in which the defendant had at least a possessory interest, or materials to which the defendant would normally have access but for the action of the prosecution in obtaining them first by governmental compulsion.

The scope of discovery to be permitted under Rule 16 is in considerable measure entrusted to the discretion of the district court. Thus the rule uses the permissive "may" rather than the mandatory "shall," and the court is to grant the request for discovery only if it is "reasonable." Moreover the order granting discovery "may prescribe such terms and conditions as are just." But there is no discretionary power in the trial court to *enlarge* discovery to include materials which are outside the explicitly defined categories listed in the rule. The rule obviously does not permit a trial court to order the attorney for the Government to make available for inspection documents which did not belong to the defendants, were not taken from

them, and were not obtained from others by seizure or process.' Yet this is precisely what the order of Judge Barnes here under review sought to accomplish. It requires pretrial production of substantially all documents relating to the case which are in the hands of the Government, irrespective of the persons from whom or manner in which they were obtained, and irrespective of whether the documents are evidentiary in nature.

The breadth of discovery which petitioners seek is virtually unlimited. If the Government has in its files documentary materials which have been voluntarily submitted to it by competitors or employees of petitioners or by members of the public in the course of the grand jury investigation leading to the indictment, or in the course of preparation for trial, and if the materials were presented to the grand jury, are to be offered as evidence, or are relevant to the allegations of the indictment, those materials must under this subpoena be produced whether or not they might constitute evidence of the guilt or innocence of the defendants. Thus the Government might be compelled to disclose to petitioners documents upon which it does not intend to rely and which are not evidentiary.

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[1] The courts have unhesitatingly treated the listed categories of materials subject to discovery as exclusive. *Shores* v. *United States*, 174 F. 2d 838 (C. A. 8); *United States* v. *Black*, 6 F. R. D. 270 (N. D. Ind.); *United States* v. *Chandler*, 7 F. R. D. 365 (D. Mass.); *United States* v. *Brumfield*, 85 F. Supp. 696, 707 (W. D. La.).

Petitioners do not contend that the instant subpoena can be sustained under Rule 16. But petitioners seek to circumvent the limitations of that Rule by invoking the general language of the subpoena provision of Rule 17 (c). The review of the development of Rule 16 which follows shows beyond question that the limitations on discovery there contained represent the considered decision of the framers, and that in the process of arriving at that decision broad discovery of the type permitted under the Civil Rules was deliberately rejected. The history of the rule makes it clear that the Advisory Committee could not have intended to undo in Rule 17 what it so carefully did in Rule 16.

At early common law pre-trial disclosure of any of the prosecution's evidence was not permitted.[8] The limited "discovery" which in time came to be permitted by some courts was entirely different from what the petitioners demand in the instant case. Ordinarily it was granted only when the defendant showed a real need to

[8] *Rex* v. *Holland*, 4 T. R. 691, 100 E. R. 1248; see *Shores* v. *United States*, 174 F. 2d 838, 843 (C. A. 8); *State ex rel. Robertson* v. *Steele*, 117 Minn. 384, 385, 135 N. W. 1128, 1129; Wigmore, *Evidence* (3rd ed., 1940) § 1859g. For a searching review of authorities in this field, see Cardozo, Ch. J., in *People ex rel. Lemon* v. *Supreme Court*, 245 N. Y. 24, 156 N. E. 84.

inspect particular identifiable objects of evidence.[9] Indeed, in most jurisdictions the defendant is not even permitted to inspect, in advance of trial, his own written statement or confession or that of a co-defendant.[10] In special circumstances, or where statutes are construed to make the records public, defendants have been permitted to inspect official records of grand jury proceedings, coroner's inquests and special investigatory bodies, but here too the prevailing rule denies pre-trial discovery and

[9] See *e. g.*, *United States* v. *Burr*, 25 Fed. Cas 30 (C. C. D. Va.); *United States* v. *Warren*, 53 F. Supp. 435 (D. Conn.); *United States* v. *Rich*, 6 Alaska 670; *Daly* v. *Dimock*, 55 Conn. 579, 12 Atl. 405; *People* v. *Gerold*, 265 Ill. 448, 107 N. E. 165; *State* v. *Lowery*, 160 La. 811, 107 So. 583; *State* v. *Haas*, 188 Md. 63, 51 A. 2d 647; *People* v. *Gatti*, 167 Misc. 545, 4 N. Y. S. 2d 130; *People* v. *Bellows*, 1 How. Pr. N. S. 149 (N. Y. O. & T.); *State* v. *Morrison*, 175 Wash. 656, 27 P. 2d 1065. And see *Cramer* v. *State*, 145 Neb. 88, 15 N. W. 2d 323.

[10] *Shores* v. *United States*, 174 F. 2d 838 (C. A. 8) (under Rule 16); *United States* v. *Silverthorne*, 265 Fed. 853 (W. D. N. Y.); *United States* v. *Garsson*, 291 Fed. 646, 649 (S. D. N. Y.); *Metzler* v. *United States*, 64 F. 2d 203, 206 (C. A. 9); *United States* v. *Molasky*, 118 F. 2d 128 (C. A. 7), reversed on other grounds, 314 U. S. 513; *Silliman* v. *People*, 114 Colo. 130, 162 P. 2d 793; *State* v. *Kypis*, 7 W. W. Harr. 27, 179 A. 640 (Del. O. & T.); *Williams* v. *State*, 143 Fla. 826, 197 So. 562; *People* v. *Parisi*, 270 Mich. 429, 259 N. W. 127; *State ex rel. Robertson* v. *Steele*, 117 Minn. 384, 135 N. W. 1128; *State* v. *Yeoman*, 112 Ohio St. 214, 147 N. E. 3, but cf. *State* v. *Cola*, 35 N. E. 2d 758 (Ohio App.); *Davis* v. *State*, 99 Tex. Cr. R. 517, 270 S. W. 1022; *Goode* v. *State*, 57 Tex. Cr. R. 220, 123 S. W. 597; *State* v. *Clark*, 21 Wash. 2d 774, 153 P. 2d 297. *Contra*, *State* v. *Dorsey*, 207 La. 928, 22 So. 2d 273. For the view that a court may, in its discretion, require the pre-trial production of a confession, see *State* v. *Haas*, 188 Md. 63, 51 A. 2d 647.

even discovery at the trial unless the materials are shown to be necessary to permit challenge of the validity of the proceedings themselves or for cross-examination purposes. *United States* v. *Oley*, 21 F. Supp. 281 (E. D. N. Y.).[11] Certainly neither the prior federal practice nor the overwhelming weight of state authority (both before and since the Criminal Rules were adopted) has recognized any broad right of pre-trial discovery in criminal cases.[12]

[11] See *Hofler* v. *State*, 16 Ark. 534; *State* v. *Hayes*, 127 Conn. 543, 18 A. 2d 895; *Cannon* v. *People*, 141 Ill. 270, 30 N. E. 1027; *Merrick* v. *State*, 63 Ind. 327; *State* v. *Gloyd*, 148 Kan. 706, 84 P. 2d 966; *Howard* v. *Comm.*, 118 Ky. 1, 80 S. W. 211; *Comm.* v. *Giacomazza*, 311 Mass. 456, 42 N. E. 2d 506; *State ex rel. Robertson* v. *Steele*, 117 Minn. 384, 135 N. W. 1128; *State* v. *McDonald*, 342 Mo. 998, 119 S. W. 2d 286; *People* v. *Schainuck*, 286 N. Y. 161, 36 N. E. 2d 94, but cf. *People* v. *Miller*, 257 N. Y. 54, 177 N. E. 306; *Brown* v. *Comm.*, 90 Va. 671, 19 S. E. 447, but cf. *Mohler* v. *Comm.*, 132 Va. 713, 111 S. E. 454; *State* v. *Truba*, 88 Vt. 557, 93 Atl. 293.

[12] *United States* v. *Rosenfeld*, 57 F. 2d 74 (C. A. 2), certiorari denied, 286 U. S. 556; *Massie* v. *People*, 82 Colo. 205, 258 Pac. 226; *Padgett* v. *State*, 64 Fla. 389, 59 So. 946; *Newton* v. *State*, 21 Fla. 53; *People* v. *Schallman*, 295 Ill. 560, 129 N. E. 569; *Weer* v. *State*, 219 Ind. 217, 36 N. E. 2d 787; *State* v. *Jeffries*, 117 Kan. 142, 232 Pac. 873; *Wendling* v. *Comm.*, 143 Ky. 587, 137 S. W. 205; *State* v. *Williams*, 211 La. 782, 30 So. 2d 834; *Comm.* v. *Noxon*, 319 Mass. 495, 535, 66 N. E. 2d 814, 839; *Comm.* v. *Jordan*, 207 Mass. 259, 93 N. E. 809; *People* v. *Kuberacki*, 310 Mich. 162, 16 N. W. 2d 703; *State ex rel. Page* v. *Terte*, 324 Mo. 925, 25 S. W. 2d 459; *State ex rel. Robertson* v. *Steele*, 117 Minn. 384, 135 N. W. 1128; *Hameyer* v. *State*, 148 Neb. 798, 29 N. W. 2d 458; *State* v. *Bunk*, 63 A. 2d 842 (Cty. Ct. N. J.); *People* v. *Gatti*, 167 Misc. 545, 4 N. Y. S. 2d 130; *State* v. *Di Noi*, 59

Petitioners have collected in an appendix to their brief excerpts from opinions in 33 criminal cases and 1 civil case concerning inspection of documents and other objects in the possession of the prosecution (Petitioners' Appendix 1–14). They have lumped together all types of inspection under all kinds of situations with the result that it is impossible to draw any conclusion from the material as presented. In an appendix to this brief, *infra*, p. 41, we have classified and analyzed petitioners' cases. That analysis reveals that in no case was a subpoena upheld which called, as does the present one, for a general disclosure of the prosecution's case.

When the Criminal Rules were being drafted, the Advisory Committee had before it, on the one hand, the absence of any substantial body of precedent approving the use of discovery in criminal cases (see *Shores* v. *United States*, 174 F. 2d 838, 844 (C. A. 8)), and, on the other hand, the example of the broad discovery procedures embodied in the recently adopted Civil Rules (*e. g.*, Civil Rule 34). The first draft of the discovery provision in the Criminal Rules reflected a decision to follow the Civil Rule pattern in fashioning a discovery device for use against the

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R. I. 348, 195 Atl. 497; *May* v. *State*, 129 Tex. Cr. R. 2, 83 S. W. 2d 338; *Abdell* v. *Comm.*, 173 Va. 458, 2 S. E. 2d 293; *State* v. *Payne*, 25 Wash. 2d 407, 171 P. 2d 227; *Santry* v. *State*, 67 Wis. 65, 30 N. W. 226. And see 2 Wharton, *Evidence in Criminal Cases* (11th ed., 1935) 1311–12; 23 C. J. S., Criminal Law, § 955; 17 Am. Jur., Discovery, § 25.

Government.[13] Proposed Rule 19 of the Preliminary Draft issued by the Advisory Committee in 1943 provided that

> the court may order the attorney for the government to permit the inspection * * * of any designated * * * documents, * * * not privileged * * *.

This proposed Rule was substantially identical (as applied to the Government) [14] with the provisions of Rule 34 of the Civil Rules then in effect, which made discovery applicable broadly to "any designated documents, * * * not

[13] It does not appear that there was any consideration given to permitting pre-trial discovery against defendants. The privilege against self-incrimination would presumably be a bar to such a procedure, except as applied to corporations. Moreover, the Government has available to it the inquisitorial powers of the grand jury.

[14] The note to the discovery provision in the preliminary draft contained the following paragraph:

"Compare Fed. Rules Civ. Proc., Rule 34 (Discovery and Production of Documents and Things for Inspection, Copying, or Photographing). See *United States* v. *Burr*, Fed. Cas. No. 14,692d, 14,694 (C. C. Va., 1807) (inspection of a letter). See also *United States* v. *Rich*, 6 Alaska 670 (1922) (inspection and photographing of a piece of glass supposed to contain the defendant's fingerprints); Wigmore, Evidence (3rd ed. 1940) § 1859g. Inspection has frequently been denied where the motion was regarded as *a "fishing expedition" or an attempt to force the government to disclose its case.* *United States* v. *Rosenfeld*, 57 F. (2d) 74 (C. C. A. 2d, 1932), cert. denied *Nachman* v. *United States*, 286 U. S. 556 (1932)." (Federal Rules of Criminal Procedure, Preliminary Draft (1943, p. 103. Emphasis supplied.)

The italicized portion of this note shows that even this broad provision was not intended to embrace the dragnet type of discovery here sought.

privileged." It represented a radical departure from existing practice.

The sweeping innovation represented by proposed Rule 19 met with resistance. See *Shores* v. *United States*, 174 F. 2d 838, 844 (C. A. 8). The urging of those who wished to provide for complete disclosure of the Government's case prior to trial was countered with the argument that the element of surprise should not be a weapon possessed only by defendants in criminal cases where the burden on the Government is heavy and the protections accorded to defendants many.[15] In the Second Preliminary Draft, issued

[15] Compare comment of Judge Yankwich in an article dealing with the proposed criminal rules (3 F. R. D. 209, 210–211):

"To some extent, a criminal prosecution, so far as the Government is concerned, is a one-sided proposition. In a complex society, in which those accused of crime have unbounded opportunity of avoiding detection and prosecution, the interests of society, in protecting itself against the anti-social forces, demands that some element of surprise be left. And I venture to say that *even the most liberal would not advocate, in the realm of criminal procedure, the broad means of discovery which the civil rules now embody* as an accepted policy." [Emphasis supplied.]

And see *People* v. *Gatti*, 167 Misc. 545, 547, 4 N. Y. S. 2d 130, 132.

Judge Learned Hand, in passing on a motion to inspect grand jury minutes, made the following general observation on pre-trial disclosure of the Government's evidence:

"Under our criminal procedure the accused has every advantage. While the prosecution is held rigidly to the charge, he need not disclose the barest outline of his defense. He is immune from question or comment on his silence; he can-

by the Advisory Committee in February 1944, the proposed rule governing discovery and inspection (which in that draft was Rule 18) was shifted from the broad channels of the Civil Rules provision. It permitted discovery as to

> designated * * * documents * * * *obtained from or belonging to the defendant or constituting evidence in the proceeding,* * * *. [Emphasis supplied.]

In the rule finally adopted (Rule 16), the Advisory Committee narrowed the scope of discovery still further. Rule 16 allows discovery and inspection of the following categories of material:

> designated * * * documents * * * *obtained* from or *belonging* to the defendant or obtained from others by *seizure or by process,* * * *. [Emphasis suppiled.]

In the Advisory Committee's Note to Rule 16 (18 U. S. C. foll. 687) all reference to the Civil Rules is omitted, and the limited nature of the discovery to be permitted is stressed:

> Whether under existing law discovery may be permitted in criminal cases is doubtful, *United States* v. *Rosenfeld,* 57 F. 2d 74, C. C. A. 2d, certiorari denied,

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not be convicted when there is the least fair doubt in the minds of any one of the twelve. Why in addition he should in advance have the whole evidence against him to pick over at his leisure, and make his defense, fairly or foully, I have never been able to see." (*United States v. Garsson,* 291 Fed. 646, 649 (S. D. N. Y., 1923).

286 U. S. 556, 52 S. Ct. 642, 76 L. Ed. 1290. The courts have, however, made orders granting to the defendant an opportunity to inspect impounded documents belonging to him, *United States* v. *B. Goedde and Co.*, 40 Fed. Supp. 523, 534, E. D. Ill. The rule is a restatement of this procedure. In addition, it permits the procedure to be invoked in cases of objects and documents obtained from others by seizure or by process, *on the theory that such evidential matter would probably have been accessible to the defendant if it had not previously been seized by the prosecution.* The entire matter is left within the discretion of the court. [Emphasis supplied.]

Thus the discovery provision underwent, in the course of its development through successive drafts, a transformation from a broad device to a limited one. In the Preliminary Draft (as Rule 19), it was very broad and was based upon Civil Rule 34. In the Second Preliminary Draft (as Rule 18), it was narrower, and in the rules actually adopted by this Court it appears in its present still more limited form. In the face of this history it is idle to look to the Civil Rules or to isolated pre-rules cases as authority for expanding the discovery authorized by Rule 16. In Point II, it is demonstrated that there is likewise no basis for achieving such a result by the subpoena route under Rule 17 (c).

II

THE LIMITS OF PRE-TRIAL DISCOVERY ESTABLISHED BY RULE 16 CANNOT BE EXPANDED BY A SUBPOENA AND ORDER TO PRODUCE UNDER RULE 17 (c)

Rule 17 (c) provides:

> (c) For Production of Documentary Evidence and of Objects.
>
> A subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein. The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive. *The court may direct that books, papers, documents or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents or objects or portions thereof to be inspected by the parties and their attorneys.* [Emphasis supplied.]

Petitioners rely upon the italicized language as supporting the instant subpoena and order to produce. Even on its face it fails to do so, for Rule 17 (c) contemplates the production of materials which are "to be offered in evidence" whereas the subpoena required production of materials "whether or not they might constitute evidence." Beyond this, however, a reading of Rule 17 (c) in its setting discloses insuperable

difficulties with the construction which petitioners seek to place on it.

First, petitioners' construction creates a square conflict with Rule 16. It seems clear that the framers of the Rules would not have created in Rule 16 a privilege of discovery by motion for production carefully limited to documents taken from or belonging to the defendant, or taken from others by seizure or process, and at the same time have created in Rule 17 (c) an unlimited privilege of pre-trial discovery by the subpoena route. Nor would the framers have conditioned the privilege of discovery in Rule 16 upon a showing by the defendant that the items sought may be "material to the preparation of his defense" if at the same time Rule 17 (c) authorized unlimited discovery by subpoena, subject only to a motion to quash on the ground that "compliance would be unreasonable or oppressive."

Petitioners contend earnestly and at length that there is no conflict between the two rules as they interpret them (Petitioners' Br. 29–36), that Rule 17 (c) was "intended as a method of securing to defendants the right to have compulsory process in their favor" (Br. 31), while Rule 16 "is, in its origin and its effect, a limitation upon the powers of the prosecution rather than an affirmation of the rights of the accused" (*ibid.*). The fallacy in this analysis is that it dwells upon the asserted purposes of the two rules rather than

upon their concrete application. We may concede that the rules had differing purposes, but that fact does not aid petitioners. To describe one rule as limiting the prosecutor and another as helping the defendant may conceal but it cannot remove a conflict.

The question properly is whether a defendant may use a subpoena *duces tecum* under Rule 17 (c) to obtain discovery of materials which the express language and history of Rule 16 exclude from discovery. Under petitioners' interpretation of Rule 17 (c) the answer to this question is plainly in the affirmative. The present subpoena was drawn to cover only those materials which could not be procured under Rule 16.

As we have seen (*supra* pp. 25–26), the draftsmen of the Rules made a deliberate choice that the broad discovery permitted in civil cases should not obtain in criminal cases, and the defendant's ability to require the Government to divulge its case should be more narrowly circumscribed. Petitioners, in effect, would have this Court hold that the framers failed to make that choice effective and that they performed a useless act in placing careful limits on Rule 16. But more than this, the conclusion is compelled that Rule 16 itself serves no purpose. Petitioners suggest that Rule 16 "grants *additional privileges* to the defendant" (Petitioners' Br. 34). If the privileges in question are thought to be additional to

those conferred by Rule 17 (c), it is difficult to conceive what those additional privileges are. Under petitioners' sweeping interpretation of the subpoena privilege, there are no limits upon the power of a court to order pretrial production of documents under Rule 17 (c).[16] Since the conflict between the two provisions as petitioners interpret them is inescapable, petitioners must be contending that the general language of the subpoena provision prevails over the specific language of Rule 16. But a basic rule of statutory construction is to the contrary. Specific provisions in a statute or rule take precedence over general language. *D. Ginsberg & Sons, Inc.* v. *Popkin*, 285 U. S. 204; *Clifford F. MacEvoy Co.* v. *United States*, 322 U. S. 102.[17]

Petitioners also suggest that in relying upon Rule 16 we are seeking to impose limitations only upon the use of Rule 17 (c) against the Government, since Rule 16 is applicable only to the

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[16] Nor can any distinction be predicated upon the discretionary nature of Rule 17 (c). For Rule 16 is also a discretionary rule (*supra*, p. 17). If Rule 17 (c) is available as a pretrial discovery device, it is unlikely that a court in its discretion would deny access under Rule 17 (c) to documents as to which it would grant access under Rule 16.

[17] In the *MacEvoy* case the Supreme Court stated (322 U. S. at 107):

"However inclusive may be the general language of a statute, it will not be held to apply to a matter specifically dealt with in another part of the same enactment * * * Specific terms prevail over the general in the same or another statute which otherwise might be controlling.' *Ginsberg & Sons* v. *Pokpin*, 285 U. S. 204, 208."

Government (Petitioners' Br. 44–45). But such is not the case. We agree that the scope of Rule 17 (c) is the same whichever party invokes it. We do contend that the limits of pre-trial discovery are established by Rule 16. Since one of those limits is that pre-trial discovery is only available in favor of defendants, it follows that pre-trial discovery against defendants is not permissible under Rule 17 (c).

Second, the sentence in Rule 17 (c) upon which petitioners rely does not, if read in context, suggest the creation of a broad discovery device. Rule 17 (a) (*supra*, pp. 2–3) provides for subpoenas *ad testificandum;* Rule 17 (c) provides that the subpoena "may also command the person to whom it is directed" to produce designated documents or other materials. When the two subdivisions are read together it is apparent that they are designed to authorize the traditional trial subpoenas by means of which witnesses may be summoned and may be required to bring documents with them to the trial or other proceeding. The novel provision for production of documents "prior to the trial or prior to the time when they are to be offered in evidence" does not alter the character of the subpoena. It permits advance production of *evidentiary* material which is to be *offered at the trial* by the party subpoenaing it, not advance production of all materials in the hands of the opposing party "whether or not they

might constitute evidence with respect to the guilt or innocence of any of the defendants" (cf. instant subpoena, *supra*, pp. 5–6).

The rule cannot reasonably be read as authorizing the court to require a general disclosure by a party of its entire case. A provision which in terms merely relates to the time at which a subpoena *duces tecum* is returnable, and the time at which the parties may be permitted to exercise the time-honored privilege of inspection of documentary materials prior to their actual receipt in evidence, should not be construed as a *carte blanche* authorization of broad pretrial discovery in the absence of any indication that it was designed so to be used.

The history of Rule 17 (c) shows that the provision on which petitioners rely was never conceived as a discovery provision. The genesis of Rule 17 (c) is found in Rule 20 of the Preliminary Draft (1943). The Advisory Committee's note to the draft rule states that the rule "applies to subpoenas *ad testificandum* and subpoenas *duces tecum* issued for attendance at a trial or hearing in the district courts, at hearings before United States commissioners, or to take depositions."[17] There is no suggestion that an

[17] Federal Rules of Criminal Procedure, Preliminary Draft (1943), p. 106. As there are no substantial changes in the language of the subdivision as it appears in the final rule, the notes to the original draft are apposite.

auxiliary discovery device was contemplated.[18] On the contrary, the sentence permitting the court to require production of documents prior to trial or prior to the time at which they are to be offered in evidence is explained as follows:[19]

> The last sentence provides for a method by which the court may permit either side to inspect subpoenaed documents or objects under the supervision of the court. It is inserted *in the interests of fairness* and for the *purpose of preventing delay during the trial*, particularly in cases where numerous documents may have been subpoenaed. [Emphasis supplied.]

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[18] Petitioners rely upon certain views of Professor Dession, 56 Yale L. J. 197, 221–222, in support of the contention that Rule 17 (c) was intended to permit subpoenas of the type here employed (Petitioners' Br. 26–28). An examination of the excerpt quoted from the Dession article, however, does not bear out the contention. Professor Dession refers to "a subpoena practice which permits of a sifting in advance of trial of the documents *actually to be offered in evidence*." (Emphasis supplied.) We concede that every document obtained in an evidentiary subpoena need not actually be offered at the trial, but the subpoena must represent a bona fide effort to obtain specific evidence which is expected to be offered. Unlike a grand jury subpoena (*Brown* v. *United States*, 276 U. S. 134; *Consolidated Rendering Co.* v. *Vermont*, 207 U. S. 541), it cannot be inquisitorial in purpose, nor can it be utilized for discovery. *American Tobacco Co.* v. *United States*, 147 F. 2d 93 (C. A. 6), affirmed on other grounds, 328 U. S. 781, is not to the contrary. The controversy there was over the right of the Government to inspect documents which had come into the possession and control of the court pursuant to valid trial subpoenas (147 F. 2d at 116). Cf. Petitioners' Br. 28.

[19] Federal Rules of Criminal Procedure, Preliminary Draft (1943), pp. 107–108.

The reference to the "purpose of preventing delay during the trial" indicates that the intended function of the provision for pretrial production was primarily to afford counsel an opportunity to exercise in advance of trial the rights which they unquestionably would have had at the trial to examine proffered evidence for authenticity and to determine whether to object to its introduction. The phrase "particularly in cases where numerous documents may have been subpoenaed" further shows that the inspection procedure is designed to give a party an opportunity to inspect subpoenaed evidence before the other party is on the point of introducing it, not to give the parties an opportunity to search each other's files by the subpoena route. If the purpose of the provision were that advanced by petitioners, the note might well have said, "particularly to permit the subpoenaing of all documents in the possession of the opposing party." The construction of Rule 17 (c) urged by petitioners thus is not only inconsistent with the express limitations on pretrial discovery found in Rule 16, but the very sentence of the rule upon which they rely was designed to permit inspection of evidence rather than to provide a device for acquiring it.

It is important for present purposes to distinguish between the object of ordinary trial process and that of discovery. In one sense every subpoena *duces tecum* is a discovery device unless the subpoenaing party is fully familiar with the

contents of each document listed. In other words a subpoena *duces tecum*, whether returnable at trial or before trial, enables a party to look at and discover the precise contents of documents. But discovery in the sense used by the framers of both Civil and Criminal Rules describes collectively the procedural devices by which a party may inquire into an opponent's case or ascertain the existence of evidence. It is the existence in the Civil Rules of this type of discovery which has ruled out, in civil cases, the "time-honored cry of 'fishing expedition' ". See *Hickman* v. *Taylor,* 329 U. S. 495, 507. It is apparently petitioners' contention that broad pretrial discovery is now applicable also in criminal procedure (Petitioners' Br. 36). But they are met with the decisive language and history of Rule 16 which show that, whatever the urging of the advocates of broad discovery, a more conservative view prevailed (*supra,* pp. 23–26). Petitioners therefore turn to Rule 17 (c) and argue in effect that because the provision does not in terms *forbid* a subpoena requiring a complete disclosure of an opponents' case, it must be construed to *permit* such a subpoena.

The fatal defect in this argument is that the subpoena described in Rule 17 (c) is the conventional trial subpoena *duces tecum* with the single novel element that the materials subpoenaed may be required to be produced prior to the time at which they are to be introduced in evidence even though the production may be prior

to trial. The traditional subpoena *duces tecum*, apart from grand jury of other inquisitorial subpoenas, is limited to specific materials to to which there was at least a reasonable showing of evidentiary character.[20] The present subpoena explicitly discards this test. Petitioners have cited many cases showing that under varying laws and circumstances courts have authorized the production of particular materials in the hands of the prosecution deemed essential to the preparation of the defense. The instant subpoena, however, is not of that character. It clearly represents an effort to secure a broad pretrial disclosure of the Government's case. Petitioners have not called for some specific document which might be crucial evidence in their defense. Compare *United States* v. *Burr*, 25 Fed. Cas. 30 (C. C. D. Va.); *Edwards* v. *United States*, 312 U. S. 473;[21]

[20] *Dancel* v. *Goodyear Shoe Machinery Co.*, 128 Fed. 753, 762 (C. C. Mass.); *Miller* v. *Mutual Reserve Fund Life Assn.*, 139 Fed. 864 (C. C. S. D. N. Y.); *United States* v. *Terminal R. Assn.*, 154 Fed. 268 (C. C. E. D. Mo.); *Hoppe* v *W. R. Ostrander & Co.*, 183 Fed. 786 (C. C. S. D. N. Y.); *General Finance Corp.* v. *New York State Rwys.*, 1 F. Supp. 381 (W. D. N. Y.); *United States* v. *Union Trust Co. of Pittsburgh*, 13 F. Supp. 286 (W. D. Pa.); *United States* v. *Balaban*, 26 F. Supp. 491 (N. D. Ill.); and see *American Car and Fdry. Co.* v. *Alexandria Water Co*, 221 Pa. 529, 70 Atl. 867; anno. 58 A. L. R. 1263.

[21] Petitioners suggest that Rule 17 (c) would not apply in the *Edwards* case situation under the decision below. This is patently erroneous since the *Edwards* case concerned an effort to obtain evidence for use "in the hearing on the plea in bar of the very foundation of the plea" (312 U. S. at 481). *Boehm* v. *United States*, 123 F. 2d 791 (C. A. 8) is in the

Boehm v. *United States*, 123 F. 2d 791 (C. A. 8). They have asked in effect to see the Government's files in this case. No case of which we are aware sanctions a comparable pretrial fishing expedition in a criminal case.[22]

In the few reported cases[23] arising under Rule 17 (c) which have actually considered the issue here, the courts have uniformly rejected attempts to convert the subpoena *duces tecum* into a broad discovery device. *United States* v. *Maryland & Virginia Milk Producers Association*, 9 F. R. D. 509 (D. D. C.); *United States* v. *Hiss*, 9 F. R. D. 515 (S. D. N. Y.); *United States* v. *Brumfield*,

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same category. Defendant was held entitled at the trial to get transcripts containing "evidence material to his defense" (123 F. 2d at 807).

[22] Petitioners seem to argue that the unusual procedure employed by them is justified as a substitute for a bill of particulars (Petitioners' Br. 62). It seems clear, however, that their right to a bill of particulars must be decided on its own merits. Certainly dragnet pre-trial discovery is not an appropriate way to ascertain with greater particularity the nature of the charge against defendants.

[23] In the unreported case of *United States* v. *Norman Littell and Lewis H. Marks* (S. D. N. Y., 1948), leave to file mandamus denied, *United States* v. *Bondy*, 171 F. 2d 642 (C. A. 2), the grounds on which the district court relied in reaching its decision cannot be ascertained since it filed no opinion. In the unreported opinion of November 10, 1949, in the case of *United States* v. *Hiss* (No. C128-402, S. D. N. Y.), it appears that a subpoena for certain specific documents had been served upon the Secretary of State and that he had complied with the subpoena to the extent of forwarding the documents to the court. In denying a motion to quash the district court stressed the fact that the subpoena had not been served on the attorney for the Government.

85 F. Supp. 696 (W. D. La.). *Maryland & Virginia Milk Producers Association* case, *supra*, is squarely in point. Defendants in that case sought a subpoena *duces tecum* directing the Government to produce all relevant documents which it had obtained from any person not a party to the proceeding whether by process or not. In denying this request, the court stated (9 F. R. D. at 510):[24]

> The purpose of this provision is a limited one. It is to make it possible to require the production before the trial of documents subpoenaed for use at the trial. Its purpose is merely to shorten the trial. It is not intended as a discovery provision.
>
> In this case the proposed subpoena *duces tecum* is not intended to be used to secure evidence to be introduced at the trial, but is intended to be employed as a broad discovery for the purposes of inspecting all the documentary evidence in possession of the Government and which the Government intends to use at the trial.[25]

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[24] It can scarcely be argued that this case involves a "discretionary" ruling (cf. Petitioners' Br. 67). Indeed, the court stated, "in a criminal case, unlike a civil action, such a right of broad discovery does not exist" (9 F. R. D. at 510). And see *United States* v. *Brumfield*, *supra*, at 707, where it was held that Rule 17 (c) "is simply complementary to Rule 16 in providing for subpoena addressed to the party having possession of the documents, to produce them."

[25] If anything, the court's description indicates that the subpoena in that case was narrower than that in the present case in that it was limited to evidence.

The holding in *United States* v. *Bondy*, 171 F. 2d 642 (C. A. 2), relied upon by petitioners (Br. 65–66), was that a petition for leave to file a petition for a writ of mandamus should be denied. The bulk of the court's brief *per curiam* opinion was devoted to a discussion of the impropriety of the issuance of the extraordinary writ where the challenged action of the lower court is not subject to the appellate jurisdiction of the court of appeals.[26] As the court below held (R. 134), this opinion cannot "be construed as a considered determination as to the character of documents which a subpoena may include or the purposes for which it may issue."

The interpretation of Rule 17 (c) here urged and adopted by the court below does not, as the dissenting judge below thought (R. 139), read out the pretrial production provision of Rule 17 (c). It merely limits that provision to the sphere for which it was intended—the advance production of specific evidentiary material subpoenaed for use at the trial.[27] It prevents what

[26] It is true that the *per curiam* opinion stated that "The most that can be urged is that the order was so sweeping as to amount to an abuse of discretion; it did not deal with matters beyond the court's jurisdiction" (171 F. 2d at 644). At most, this statement imports a holding that for the purpose of mandamus the court would limit its inquiry to the question whether a district court has the power to issue a subpoena *duces tecum*.

[27] Thus in a murder prosecution the Government might have possession of the alleged murder weapon which the defense desired to offer at the trial. A subpoena under Rule

is basically a trial subpoena from being converted into a device for obtaining a broad pretrial exploration into the opposing party's case, not sanctioned by Rule 16 or precedent. The subpoena here at issue would not be valid as a trial subpoena. We submit that it cannot be sustained as a pretrial subpoena.

CONCLUSION

For the foregoing reasons the judgment should be affirmed.

Respectfully submitted.

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17 (c) requiring production of the weapon might validly be ordered returnable prior to trial, although the weapon was not taken from the defendant or others by seizure or process. Or the letter in *United States* v. *Burr*, 25 Fed. Cas. 30, 37 (C. C. D. Va.) which "the accused believed to be essential to his defense, which may, for aught that now appears, be essential" could appropriately be subpoenaed prior to trial.

APPENDIX

Petitioners set forth in an appendix to their brief 33 criminal cases and 1 civil case which discuss discovery. As petitioners do not classify the cases by holdings, the impression created by the selected language quoted from the opinions is somewhat misleading. As the following analysis indicates, none of the cases is a precedent for the dragnet type of pretrial discovery attempted in the present case.

1. *Federal Criminal Cases.—United States* v. *B. Goedde & Co.*, 40 F. Supp. 523 (E. D. Ill.), holds that a defendant may have access to papers *taken from him*, and thus the case falls squarely within Rule 16. In fact, it is cited as a precedent in the Advisory Committee's note to the Rule (*supra*. p. 26; see Petitioners' Br. 32). It can scarcely be cited as authority for exceeding the limits of Rule 16.

United States v. *Warren*, 53 F. Supp. 435 (D. Conn.), permitted discovery broader than that provided under Rule 16 as adopted, but the court expressly relied upon the then current proposed version of the discovery and inspection rule which was subsequently discarded in favor of the present, more limited, Rule 16 (*supra*, pp. 22–25). See 53 F. Supp. at 436.

United States v. *Rich*, 6 Alaska 670, permitted discovery as to a specific piece of *evidence* deemed essential to the defendant's case—a piece of glass supposed to contain the defendant's fingerprints.

2. *State Criminal Cases.*—These cases fall into the following categories:

(a) Cases in which denial of discovery was sustained or granting of it was reversed.

State v. *Superior Court*, 39 Ariz. 242, 5 P. 2d 192.

Massie v. *People*, 82 Colo. 205, 258 Pac. 226.

Weer v. *State*, 219 Ind. 217, 36 N. E. 2d 787.

Padgett v. *State*, 64 Fla. 389, 59 So. 946.

Wendling v. *Comm.*, 143 Ky. 587, 137 S. W. 205.

Comm. v. *Noxon*, 319 Mass. 495, 66 N. E. 2d 814.

Comm. v. *Jordan*, 207 Mass. 259, 93 N. E. 809.

Hameyer v. *State*, 148 Neb. 798, 29 N. W. 2d 458.

Cramer v. *State*, 145 Neb. 88, 15 N. W. 2d 323.

People v. *Gatti*, 167 Misc. 545, 4 N. Y. S. 2d 130.

State v. *Morrison*, 175 Wash. 656, 27 P. 2d 1065.

(b) Cases approving inspection of particular objects or items as to which there is a showing of potentially crucial importance to the defense. Accord: *United States* v. *Rich*, *supra*.

Parsons v. *State*, 251 Ala. 467, 38 So. 2d 209.

People v. *Gerold*, 265 Ill. 448, 107 N. E. 165.

State v. *Lowery*, 160 La. 811, 107 So. 583.

State v. *Naething*, 318 Mo. 531, 300 S. W. 829.

Matter of Hughes v. *Kings County Court*, 181 Misc. 668, 41 N. Y. S. 2d 843.

People v. *Wargo*, 149 Misc. 461, 268 N. Y. S. 400.

People v. *Radeloff*, 140 Misc. 690, 252 N. Y. S. 290.

People v. *Bellows*, 1 How. Pr. N. S. 149.

State v. *Circuit Court of Minnehaha County*, 60 S. D. 115, 244 N. W. 100.

(c) Cases approving inspection of accused's statement or confession.

Jones v. *State*, 213 Ark. 863, 213 S. W. 2d 974.

State v. *Dorsey*, 207 La. 928, 22 So. 2d 273.

State v. *Haas*, 188 Md. 63, 51 A. 2d 647.

People v. *Rogas*, 158 Misc. 567, 287 N. Y. S. 1005.

(d) Cases permitting inspection of records of grand jury proceedings, coroner's inquests or special investigatory bodies in special circumstances.

Daly v. *Dimock*, 55 Conn. 579, 12 Atl. 405 (construed as public records).

People v. *Kresel*, 142 Misc. 88, 254 N. Y. S. 193.

State v. *Hinkley*, 81 Kan. 838, 106 Pac. 1088 (construed as public records).

(e) Cases as to which there is no indication from the report that the inspection involved was pre-trial in nature.

State v. *Bramhall*, 134 La. 1, 63 So. 603.

State v. *Tippett*, 317 Mo. 319, 296 S. W. 132.

3. *Miscellaneous cases.*—*Trustees of Schools* v. *American Surety Co.*, 307 Ill. App. 398, 30 N. E. 2d 513, is a civil case presumably included in petitioners compilation inadvertently. *Matter of Attorney General of United States*, 160 Misc.

533, 291 N. Y. S. 5, was not a discovery case. It involved an application by the United States in a state court for access to state grand jury minutes for use in a federal prosecution.

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